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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION; PEOPLE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS No. 26738.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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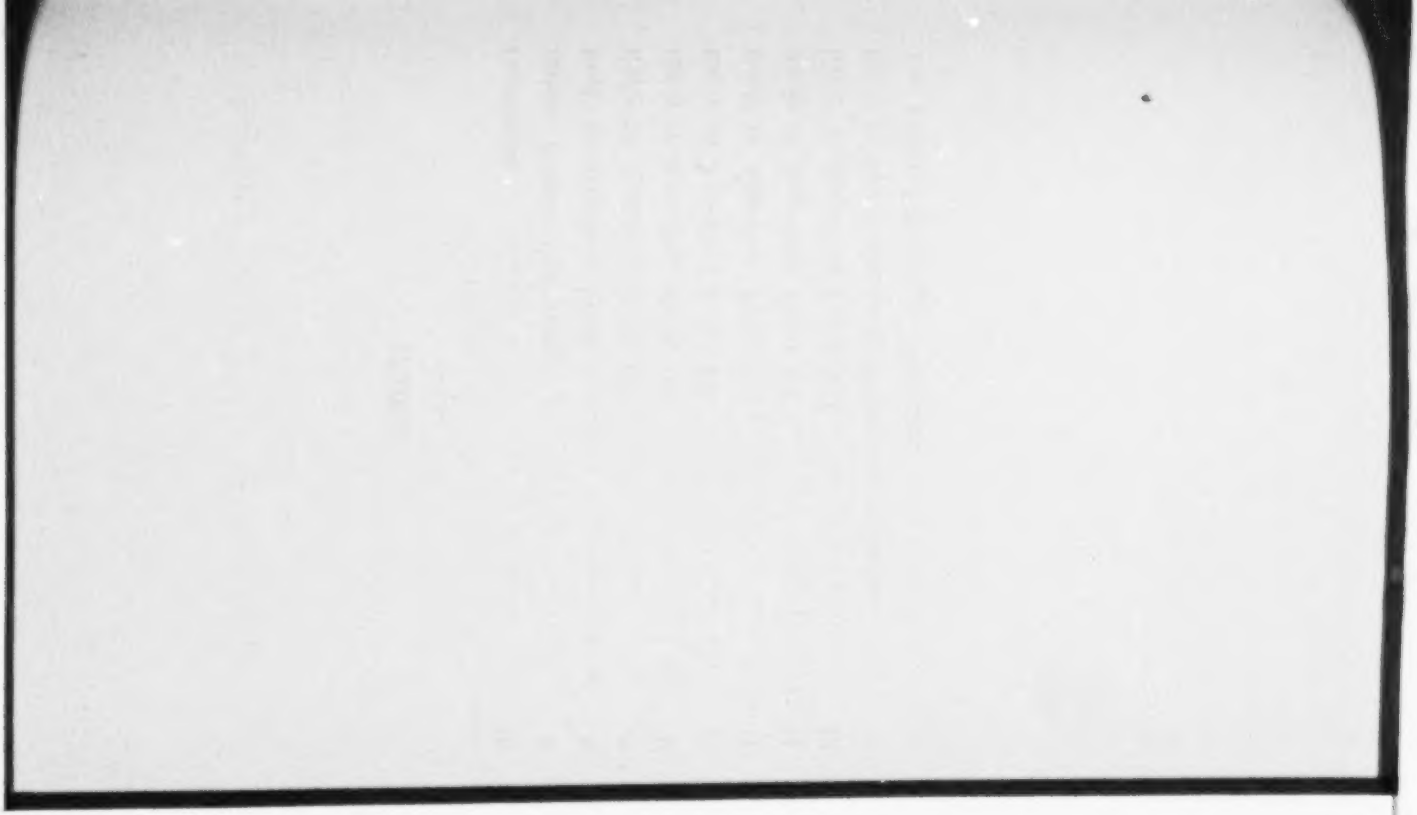

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MAY IT PLEASE THE COURT:

In this brief, appellant will follow as nearly as possible the order of appellees in their Statement Opposing Jurisdiction.

THE PRELIMINARY STATEMENT OF FACTS.

Although appellees seem to argue that no Federal questions are presented, they admit again and again that such questions were presented. On page 2 they say that appellant contended that because no clerk or sheriff was present at the time the medical commission conducted the inquest in the presence of the judge, she was denied due process

of law. They even quote from the amended petition, which challenged the proceedings on the ground that no court was in session, when the order in question was entered.

Counsel errs in two respects in saying this question was not mentioned again until the petition for rehearing, after the decision of the Illinois Supreme Court:

(1) Appellant challenged the authority of the county judge and the two commissioners to act, and the Illinois Supreme Court agreed with appellant on that point. This fact seems to have been overlooked by appellees, but the court said in its last opinion (383 Ill. 409, 418):

> "This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (*Witter* v. *Cook County Comrs.*, 256 Ill. 616.)"

This misconception of appellees appears again and again, as they blithely repeat that they have constantly contended that no clerk or sheriff was necessary to have a court. They have so contended, but not even the Illinois Supreme Court could go that far. Apparently counsel is not aware of the difficulty confronting the Illinois Supreme Court in affirming the judgment here appealed from. It had to twist the Lunacy Act into unrecognizable shape and say that it made the county judge a roving commissioner of the legislature to take testimony in a catch as catch can fashion outside of court and then take it into his court and formally approve his findings in the absence of the patient. This construction ignores the requirements of the Lunacy Act that the presence of the accused at the hearing is indispensable; that jurisdiction over lunacy inquests is vested only in the county court; and that the county judge may not exclude the court officials, the accused or her attorneys from the hearing. (Ill. Rev. Stat. Chap. 85, pars. 8, 13.) The appellees further say that we should have anticipated that the Illinois Supreme Court would have adopted the above construction of the act to avoid the rule of law that due process

of law requires a court proceeding, although it never occurred to appellees to make such an argument. Appellees are so entranced by the argument that no court was necessary that they have not bothered to read the court's last opinion.

(2) It is no objection to this court's jurisdiction that a question was raised on rehearing, if the question was injected by an unanticipated construction of a state statute. The argument that appellant should have anticipated this construction is absurd. Appellees say that we should have anticipated the construction, because appellant has lost a few battles along the way. We never anticipated a rehearing of a unanimous opinion, and we could not anticipate a construction that was not contended for.

Appellees run true to form when they assert that we have never contended that Mrs. Cash was not insane. In the next breath they accuse her of being sane and vengeful. The mental condition of appellant is immaterial, this being solely a question of jurisdiction. Appellant has constantly urged this in vain. (Appellant's Petition for Rehearing, p. 8, Rec. 87.) If she were insane, the flagrant disregard of the procedure for committing her was aggravated, because the alleged notice was then given to an insane person, and she was expected to ask for counsel and a jury trial and to ascertain that a court was properly convened and in session. As the Illinois Supreme Court said was the law in *Haines* v. *Cearlock*, 184 Ill. 96, at 97:

> "• • • The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be

surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. * * *"

That is precisely what happened to appellant, and the highest court of the state is still willing to concede that she has a right to a struggle. It refused to dismiss our appeal in the present proceeding, which stamps the procedure we followed as proper. It denied appellees' motion to dismiss the appeal made on the ground that a writ of *habeas corpus* had been denied, thus indicating that habeas corpus is simply a cumulative remedy. (Rec. 62.)

Appellees are insincere in their allegations that appellant intends to bring suits for false imprisonment, when her counsel have disavowed any such intention in open court and even offered a covenant not to sue the individuals involved in her commitment. The Metropolitan Trust Company, appellee, accepted the conservatorship after this case had once been to the Appellate Court, knowing that appellant challenged the validity of her commitment and of any appointment of a conservator based thereon, and of her intention to demand that her property be restored to her without deduction, and they are in no position to impugn anyone's motives. The conservator is not the one that has been imposed upon in this case. They used her money against her.

The right to a struggle is meaningless, unless appellant has the right to have her property restored to her without deductions for conservator's and attorneys' fees spent to defeat her own rights.

There Are in Fact Two Federal Questions.

There are in fact *two* federal questions in this case, and appellees have confused them. As stated above they point out that the question of due process of law was raised by the amended petition filed in the trial court. That was

soon enough to raise it, because it gave the trial court the opportunity to avoid error. This is the question that appellees say was waived by an appeal to the Appellate Court. Appellant anticipated this argument and cited authorities to show that it is not every constitutional question which will warrant a direct appeal, under Section 75 of the Civil Practice Act. (Ill. Rev. Stat. Chap. 110, par. 199.) (See Authorities cited under Paragraphs B and F of Jurisdictional Statement.) The Supreme Court of Illinois has construed that act as not including questions of judicial error, *i. e.*, where it is claimed that due process of law has been denied through failure of the court to follow the law. In this case, if the Lunacy Act had been followed, there would be no cause to complain. The denial of due process of law lies in the failure to follow the plain terms of the Lunacy Act, and thus to deprive appellant of her liberty and property. In such a case the appeal must go through the Appellate Court. The Supreme Court of Illinois did not refuse to consider the question as to the organization of the court on the ground that the question was not open, and did not consider the question as being waived. The Supreme Court mentions the Constitutional question by saying it was raised in the trial court. Clearly the *certiorari* question was preserved. Moreover, the Illinois Supreme Court in *Haines* v. *Cearlock*, 184 Ill. 96, 98-100, refused to entertain a direct review because only judicial error was involved under the Lunacy Act. That case also involved due process of law.

The question which gives this court jurisdiction on appeal was raised at the first opportunity by filing a petition for rehearing in the Supreme Court of Illinois wherein appellant challenged the construction placed upon the Lunacy Act by the court in its last opinion. This was an unanticipated construction, and the question was properly raised on petition for rehearing. *Herndon* v. *Georgia*, 295 U. S. 441; *Saunders* v. *Shaw*, 244 U. S. 317, 320.

Although a petition for *habeas corpus* was filed and denied, appellant was nevertheless released from custody by the institution a few days later. Evidently, the officers of Resthaven did not consider appellant to be insane.

The *habeas corpus* proceeding was filed to obtain appellant's release on the ground that she was sane when the petition for *habeas corpus* was filed. (Rec. 48.) The question of jurisdiction was not before the court. The petition recited that the present proceeding was pending on appeal. (Rec. 48, 56.) The issue presented was different and the *habeas corpus* proceeding is not *res judicata*.

The Florida proceedings would not be binding on the Illinois court in an original lunacy proceedings in Illinois, and a finding that appellant was insane by the Florida court would not waive the necessity of proceeding according to the statute in this state. This was not a suit on a foreign judgment and the Florida record was not mentioned in the County Court but was presented as evidence on appeal before the Circuit Court over the objection of the appellant.

On page 5, appellees state that our conclusions of fact are not supported by the record. No inaccuracy is pointed out and to avoid misstatement many of the facts were taken from the opinion of Justice Smith, who found that there was substance to appellant's charges that she had been brought into Kane County by fraud and duress.

Appellees assert that appellant had notice of the proceeding. As pointed out at length in the dissenting opinion, there was no order fixing the kind of notice to be given, as required by statute. The judge wrote on the back of the petition the words, "Give respondent at least 24 hours notice of hearing," and set the hearing for May 23, 1938 at *10:00 A. M.* Respondent was Libby Goll, the superintendent of Resthaven, and not the appellant. The State's Attorney wrote a letter to Mrs. Cash and notified her that the hearing would be at *2:00 o'clock* in the after-

noon. This letter was served on Resthaven Institution on May 21, 1938, by a constable, but was not delivered to Mrs. Cash until a few moments before the hearing. There was no order directing that kind of service to be made. Likewise there was no affidavit filed showing that appellant was unable to attend a hearing at the court house, as required by statute. (Ill. Rev. Stat. 1937, Chap. 85, par. 4.) On page 18 appellees say the statute requires that the hearing shall be in the presence of the patient, unless his or her mental and physical condition is such that it would be manifestly improper. They say: "This latter fact, if such be the case, must be established by an affidavit to that effect filed in the proceeding." Appellant has contended that such affidavit is necessary, and that its absence renders the hearing at Resthaven void. Appellees now seem to admit that an affidavit is necessary in this statutory proceeding, but they say that if it is filed the hearing may be held in the absence of the accused. Appellees are manifestly confused as to the function of the affidavit. In any event they make no attempt to explain its absence from the record. Section 8 of the Lunacy Act makes the presence of the accused indispensable, and "no proceedings can be had in his absence." (*Haines* v. *Cearlock*, 184 Ill. 96, 98, 99.) The hearing *must* be held at the court house, unless an affidavit is filed showing that the accused is unable to attend. It may be held away from the court house, if such affidavit is filed. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) No such affidavit was filed in this case. This proceeding is void for failure to give notice as directed by the judge, for failure to file an affidavit showing that Mrs. Cash was unable to attend a hearing at the court house, and for failure to conduct the hearing by a legally constituted court since no clerk or sheriff was present and no court ever convened.

ARGUMENT.

I.

The appellees contend that the federal question was not entertained or decided by the state court, and therefore, this court has no jurisdiction. The case of *Herndon* v. *State of Georgia*, 295 U. S. 441, cited by appellees under Point I, while stating that a federal question may not be raised after judgment by filing a petition for rehearing, also states the exception which is here applicable. That rule is subject to the exception that where the question first arose from the unanticipated act of the state court in giving to a statute a new construction, which threatens rights under the Federal Constitution, the first opportunity of raising the question being the petition for rehearing, then the federal question may be raised by such petition for rehearing. (*Saunders* v. *Shaw*, 244 U. S. 317, 320.) In the *Herndon case* the Georgia Supreme Court had previously placed the same construction upon the statute there involved, and so the decision appealed from could have been anticipated. Appellees' suggestion that appellant could have anticipated the construction placed upon the Lunacy Act by the Illinois Supere Court, even though they did not contend for it, is absurd, as long as *Haines v. Cearlock*, 184 Ill. 96 was unreversed.

In *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, the Illinois Supreme Court had held that the constitutional questions had not been properly preserved under the Illinois practice. This court properly refused to review questions which had not been properly preserved according to local practice. The Illinois court did not re-

fuse to entertain the questions presented in the case at bar on procedural grounds.

In *New York* v. *Graves*, 300 U. S. 308, the appellant sought to argue a question as to the retroactivity of the statute, which he had not presented below in any form. These cases are not in point.

II.

Appellant's discussion of the *Herndon case* under Point I disposes of this point, where it is pointed out that a petition for rehearing is a proper method of raising a federal question, where the highest state court injects the question into the case by adopting an unanticipated construction of a statute.

III.

Appellees here concede that a federal question was raised in the state circuit court, but claim that it was waived by appealing to the Appellate Court. None of the Illinois courts held that it was not necessary to have a clerk or sheriff present in order to have a legal court. The Appellate Court ignored the contention, and the Supreme Court in its last opinion overruled appellees and affirmed the judgment for a reason not argued by either side.

Appellant anticipated appellee's argument under this point. (Parts B and F of Jurisdictional Statement.) Section 199 of the Civil Practice Act quoted by appellees has been construed by the Illinois Supreme Court not to include cases where it is contended only that the court erred in failing to follow the law, viz., judicial error. A reading of the cases there cited will readily demonstrate that this case would have been transferred to the Appellate Court, if a direct appeal had been taken, because at that time all that appellant could contend was that the Lunacy Act as

construed in *Haines* v. *Cearlock*, 184 Ill. 96, had not been followed in any substantial regard. As appellant has conceded, the Lunacy Act provides for due process of law; it is the administration of it as now sanctioned by the highest state court that denies the right to a hearing before a legally constituted court. Under the Illinois practice such questions are routed through the Appellate Court. *Haines* v. *Cearlock, supra,* is authority that a direct review will not lie in a lunacy case. There a writ of error to the circuit court was dismissed for want of jurisdiction. Now the practice is for the reviewing court to transfer the case to the proper court, instead of dismissing the action.

IV.

Appellees contend that the federal question is not substantial, because appellant is at liberty, though out of funds, and if she is given justice, it is suggested, that she will file suit for damages for false imprisonment. The substantiality of a question does not depend upon the motives of the litigants. Appellant contends that appellees are not at all concerned about suits for false imprisonment. The Metropolitan Trust Company is concerned only over its liability for dissipating appellant's property, if its particular conduct is not approved. Appellant has objected to the appellee conservator appearing against her in every court. (Rec. 17.) It has no right to oppose its ward. (*Mathews* v. *Sargent*, 175 Ill. App. 287, 289.) Now it pleads for sympathy and maligns its ward so that this court will give it the protection of a void order declaring appellant to be insane. This order formed the basis for the appointment of a conservator, which has never rendered ten cents worth of service to appellant, but has charged exorbitant fees for itself and its attorneys for opposing its ward in this proceeding. The Metropolitan Trust Com-

pany knew when it accepted the appointment that the authority of the court to declare Mrs. Cash insane had been challenged, but it nevertheless accepted the appointment and has dissipated appellant's estate upon the strength of it. A conservator which is conscious of its duty, would have declined the appointment or would have joined with the ward to protect her rights.

Appellant has been forced to employ her own counsel to obtain justice. The appelles have over $10,000 of appellant's money under their control which they are using against her.

The questions presented by this appeal have never been decided, and they are not so obviously untenable as to warrant the court in refusing to occupy its time with them. Every person in Illinois is subject to such treatment until this procedure is settled.

V.

This point is sound as far as it goes. An unreasonable or arbitrary construction of a state statute will not even be tolerated by this court, much less accepted by it. *American Railway Express Co.* v. *Kentucky,* 273 U. S. 259; *Booth* v. *Illinois,* 184 U. S. 425.

VI.

Appellees contend that the Lunacy Act as construed by the decision in this case affords appellant all guarantees of due process of law. The first answer to this broad claim is that the act as construed by the court bears no relation to the intention expressed by the legislature, and it does not afford equal protection of the laws. An arbitrary decision is not due process of law.

The Illinois court conceded that it was necessary to have the accused committed by a legally constituted court. That

is the only means of exercising judicial power. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) It evaded that rule by saying that the judge and his commission could meet anywhere and hear testimony and then convene court and adopt its findings. Aside from the fact that the suggested procedure was not even followed in this case, the construction of the highest state court overlooks the fact that the Lunacy Act says that the presence of the accused is indispensable, and she admittedly was never present in the court house of Kane County. She was not present when the judge entered the order in court, if court was ever convened. There is nothing in the act warranting such procedure, and lunacy proceedings are strictly statutory. Appellees take refuge in statements as to what the "ancient law" may have been. It is sufficient to say here that there is no "ancient law" in force in Illinois, in relation to lunatics, and county courts or county judges have no chancery power, except to enforce their limited jurisdiction. What counsel euphemistically calls "ancient practice" is simply a careless habit that has grown up among county judges without the sanction of the legislature.

In this point appellees point to the fact that no affidavit was filed showing that appellant was unable to attend court. They can derive no comfort from this deficiency in the record. We urged it as ground for reversal on rehearing in the Apellate Court and in the Supreme Court, but the Supreme Court said the point had been raised too late. Ordinarily in statutory proceedings, defects in the record cannot be waived, but as the dissenting justice points out the ordinary rules were not followed in this case.

Appellees err when they contend that if an affidavit is filed showing that the accused is unable to come to the court house, the hearing may be held in her absence. Section 8

of the statute plainly says that the presence of the patient "is indispensable" and no proceedings can be had in her absence. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) The only office of the affidavit is to give the court authority to *hold court* away from the county seat. There still must be a court, because the county court alone is vested with jurisdiction of lunacy proceedings. The individual who happens to be the judge has no judicial power.

VII.

Appellees' contention that the decision appealed from does not change the Illinois law and the decision should have been anticipated is based upon a failure to understand the last opinion of the Supreme Court of Illinois. We concede that the precise question was not presented in the case of *Haines* v. *Cearlock*, 184 Ill. 96, but the cases are analogous and the ringing denunciation of the failure to follow the Lunacy Act in that case led appellant to suppose that the case would be controlling. Counsel points out that nothing was said about the necessity of having the inquest before a court. That was implicit, because it has always been the law in this state that judicial power can only be exercised by legally constituted courts. The Illinois Supreme Court reaffirms that principle in the present case, but promptly disregards it. The absence of anyone authorized by law to conduct a hearing is just as fatal as the failure to give notice. The county judge was just as incompetent to hear this inquest as was the village idiot, because he is not vested with jurisdiction over lunacy proceedings. The jurisdiction is vested in the court over which he presides, and the clerk and sheriff are just as essential as is the judge, under Illinois law.

Conclusion.

So that the court will not deem this argument as being without substance, appellant points out the good sense of the policy adopted by the legislature and the utter nonsense of permitting the present type of proceedings. Court proceedings are designed so that public notice will be given of what goes on. Usually courts are held at a fixed place so that notice will be effective. The party who is brought before the court can tell by observation that he is in court. He sees the judge and court attendants, and is usually in a room that can easily be recognized as a court room. He hears the convening proclamation of the sheriff. He is put on notice that something is happening to him, and most citizens know enough to ask for counsel at once, or if a criminal case the court will appoint counsel.

In this case the judge and two doctors called on Mrs. Cash at Restnaven, just after she had had a wisdom tooth extracted. They sat down informally and asked her a few questions, while she spat blood. Doctors asking questions of a patient in a hospital would excite no curiosity, and if they mumbled the name of the judge, the patient would probably think he was another doctor. The individuals then departed, filed the papers at the clerk's office, and the patient was an adjudged lunatic. If an affidavit had been filed on which perjury could be assigned showing that the patient was unable to attend court, the court could be held away from the county seat. But the convening of court by the sheriff and the presence of the clerk with his docket and the swearing of witnesses would tell the patient at once that something judicial was going on and she could ask for her attorney, or if she were sufficiently informed, for a jury and a public hearing.

The very thing that the court inveighed against in *Haines* v. *Cearlock*, 184 Ill. 96, happened in this case. A

woman with all her faculties found herself suddenly bereft of her property and shut up in a madhouse without any pretense of following the Lunacy Act.

The appellees take isolated language from the opinion in *Haines* v. *Cearlock, supra,* and the last opinion in this case and endeavor to show that the two cases are consistent. The appellees omit rather pertinent language from their quotation of the *Haines case.* The court said, p. 99:

> "A court is a place where justice is administered judicially and the person authorized to administer justice in a judicial capacity must be present."

The opinion points out the necessity of an affidavit showing that the patient is unable to attend court, before it can be held elsewhere.

Appellees also overlook that their quotation from the *Haines case* says the presence of the patient is indispensable, while the decision here appealed does away with that requirement, because it does not require the presence of the patient when the judge convenes court and enters the order. Further, the court said in the *Haines case* that the statute contemplates a hearing, which necessitates the presence of the judge. Certainly he would have to be present, but the word "hearing" implied a court hearing, because that is necessary to due process of law and has been so held in Illinois from the beginning down to and including the present case. The present opinion plainly does away with the requirement that the judge be presiding in court when he exercises his judicial power, for the simple reason that the Supreme Court would create a commissioner out of the judge. The only commission authorized by the Act is a medical commission.

Finally, on page 21 appellees admit that the constitutional question has been in the case all along after the filing of the amended petition. We will admit that as to the *certiorari* question. We anticipated that the Supreme

Court would follow the plain terms of the Lunacy Act and reverse the judgment. The allowance on an appeal and the reversal of the judgment in the first opinion raised our hopes still further. We say that nobody could have anticipated what happened to us on rehearing.

PRAYER.

Appellant respectfully asks that the motion to dismiss or affirm be denied, but if this court is of the opinion that no federal question has been presented over which it has jurisdiction on appeal, then the papers filed herein be treated as a petition for the writ of *certiorari* and that the writ be awarded.

Respectfully submitted,

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